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IN THE HIGH COURT OF NEW ZEALAND
AT AUCKLAND

CIV 2013-404-2168

IN THE MATTER of the New Zealand Bill of Rights Act 1990 and the
Government Communications Security Bureau Act 2003

BETWEEN **KIM DOTCOM** of Auckland, Businessman
First Plaintiff

MONA DOTCOM of Auckland, Married Woman
Second Plaintiff

BRAM VAN DER KOLK of Auckland, Businessman
Third Plaintiff

JUNELYN VAN DER KOLK of Auckland, Married
Woman
Fourth Plaintiff

MATHIAS ORTMANN of Auckland, Businessman
Fifth Plaintiff

FINN BATATO of Auckland, Businessman
Sixth Plaintiff

AND **ATTORNEY-GENERAL** in respect of the New Zealand
Police
First Defendant

AND **ATTORNEY-GENERAL** in respect of the Government
Communications Security Bureau
Second Defendant

PLAINTIFFS' REPLY TO STATEMENT OF DEFENCE DATED 14 MAY 2013
Dated 28 May 2013

Judicial Officer Winkelmann J



Simpson Grierson

Barristers & Solicitors
William Akel
Telephone: +64-9-977 5090
Facsimile: +64-9-977 5028
Email: william.akel@simpsongrierson.com
DX CX10092
Private Bag 92518
Auckland 1141

HIGH COURT

28 MAY 2013

AUCKLAND

Counsel

Paul Davison QC
P.O. Box 105513
Auckland 1143

Telephone: +64-9-379 2227
Facsimile: +64-9-308 9555
Email: paul.davison@davison.co.nz

Guyon Foley
P O Box 105267, Auckland 1143
Telephone: +64-9-307 1300
Facsimile: +64-9-307 8182
Email: gfoley@gfoley.co.nz

To: The Registrar of the High Court at Hamilton
and
To: The defendants

**THE PLAINTIFFS SAY BY WAY OF REPLY TO THE DEFENDANTS'
STATEMENT OF DEFENCE DATED 14 MAY 2013:**

1. Their reply is limited to specifically answering paragraphs 45, 46, 53, 56, 57 and 60; the affirmative defences to the second and third causes of action; and paragraphs 98, 108 and 128; and generally responding to paragraphs 122, 125, 130, 137 and 141 of the defendants' statement of defence dated 14 May 2013.
2. In reply to paragraph 45, they deny any precautions, special or otherwise, that may have been taken during the execution of the warrants because of the second plaintiff's pregnancy were such as to mitigate the unreasonableness of the search and/or seizure as referred to in the statement of claim, and in particular, the detaining of the second plaintiff by herself, or separated from her children or those under her care.
3. In reply to paragraph 46, they deny that the role of the STG was to ensure Police were able to secure the property quickly and safely, and with the lowest possible risk of relevant evidence being lost, but was rather part of a preconceived and unjustified use of excessive, aggressive and invasive force, and unreasonable and unnecessary when there was no real risk of relevant evidence being lost, and no such risk had been indicated by any of the information available to the Police, including that information obtained through the involvement of GCSB in Operation Debut.
4. In reply to paragraph 53 they say:
 - (a) The first plaintiff believed at all times that the firearms were properly licensed and entitled to be in the premises as they had been obtained by Mr Wayne Tempero, the head of security, who advised the first plaintiff that he was entitled to have the firearms, and that there was a licence for them.

- (b) One of the firearms was in a cabinet in Mr Tempero's room, separate from the main residence, while the other firearm was in a cabinet in the safe room. Mr Tempero's room was regarded as a secure room and was customarily locked, and the safe room or "red" room was a secret and concealed room which was considered to be thereby effectively secure.
 - (c) The first plaintiff had instructed Mr Tempero that he did not want to have lethal ammunition in the firearms, at least for the first two rounds.
 - (d) The first plaintiff had never used the two guns since their arrival at the residence.
- 5. In reply to paragraph 56, they admit that the Police offered to facilitate consultations between the legal advisers and occupants away from the area being searched but further say:
 - (a) At about 11.00 to 11.30 am the legal advisers, Mr Robert Gapes and Ms Vanessa Clements, arrived at one of the gates to the property and explained to Police that they acted for Mr Dotcom and sought access to the property. This request was made both of the officer stationed at the gate, and on subsequent occasions to the officer in charge, Detective Sergeant Humphries.
 - (b) Detective Sergeant Humphries refused to give the legal advisers access to the property. At an early stage he responded that the Police were involved in a big operation, they needed control over the property, and they could not assign someone to look after them.
 - (c) Some time after the Police first refused entry to the legal advisers, the Police allowed the legal advisers to talk to Mrs Dotcom and some staff at the gate house to the main property.

- (d) At about 5.00pm the legal advisers were permitted to go by road to the adjoining property at 5H The Prom after the Police had concluded their search and seizure operations at that property.
- 6. In reply to paragraph 57, they deny that the first plaintiff hid from Police for approximately 10 minutes after realising Police were searching for him, and that he refused to comply with Police instructions to show his hands, and further say:
 - (a) Not knowing that the assault on the property was a Police raid, the first plaintiff went into the safe or "red" room next to his bedroom after pressing an alarm button that was installed by his bed in case of emergency, in accordance with the household security plan and protocol.
 - (b) The location of the safe room was identified to the Police by Mr Wayne Tempero, who also informed police how to open the door of the safe room.
 - (c) The first plaintiff was seated, in front of a pillar at the far end of the safe room, with his arms extended to either side of him showing his open and empty hands, thereby demonstrating that he was not holding anything.
 - (d) The first plaintiff was then assaulted in various ways by the police officers without justification, and when the first plaintiff had offered no resistance to them.
- 7. In reply to paragraph 60, they deny that the damage to doors and other property was necessary in light of the operational requirements associated with the execution of the warrant and they deny that the Police or those acting on their behalf or under their control or authority did not damage any part of the CCTV system when executing the warrant.
- 8. In reply to the affirmative defences pleaded to the second and third causes of action they apprehend that whether the first defendant was at

all material times acting in obedience to a court process, and/or in connection with the execution (or purported execution) of judicial process and is protected from liability by section 44 of the Policing Act 2008, and sections 6(4) and 6(5) of the Crown Proceedings Act 1950, is a question of mixed law and fact.

- (a) Protection under these Acts does not, however, extend to or protect from liability the actions undertaken unreasonably, unlawfully or in bad faith.
- (b) They deny that the first defendant is protected from liability under the said Acts in that in obtaining and/or executing the search warrants, the Police acted unreasonably, unlawfully and/or in bad faith, in such manner as set out in the Statement of Claim.

- 9. In reply to paragraphs 98, 108, and 128, as at 15 December 2010 the first and second plaintiffs, having been issued with resident class visas on 23 November 2010, which were activated upon their arrival in New Zealand on 15 December 2010, were thereafter entitled to reside in New Zealand indefinitely, and any interception of their communications was unlawful in that it breached section 14 of the Government Communications Security Bureau Act 2003.
- 10. In reply to the assertions of fact set out in the defendants' Statement of Defence, and in particular in paragraphs 122, 125, 130, 137 and 141, the plaintiffs have no or insufficient knowledge of, and accordingly deny, the matters set out therein.

This Reply is filed by WILLIAM AKEL solicitor for the plaintiffs of the firm of Simpson Grierson.

The address for service of the Plaintiffs is at the offices of Simpson Grierson, Level 27, 88 Shortland Street, Auckland.

Documents for service on the Plaintiffs may be left at that address for service or may be -

- (a) posted to the solicitor at Private Bag 92518, Auckland; or

- (b) left for the solicitor at a document exchange for direction to DX CX10092;
or
- (c) transmitted to the solicitor by facsimile to +64-9-307 0331; or
- (d) emailed to the solicitor at william.akei@simpsongrierson.com